In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1180

JOHN THOMAS FLOWER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Western District of Texas, petitioner was convicted of having violated 18 U.S.C. 1382 by re-entering a military installation after he had been formally debarred from entering the installation. He was sentenced to six months' imprisonment. A divided panel of the court of appeals affirmed (Pet. App. 1a-30a; 452 F. 2d 80) and petitions for rehearing *en banc* were denied (three judges dissenting) on January 13, 1972 (Pet. App. 31a-32a).

The evidence at trial showed that on or about October 25, 1969, petitioner received a properly executed order of debarment from the deputy commander of

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Fort Sam Houston, a permanent United States military base located in the City of San Antonio, Texas (Tr. 16–17),[1] barring petitioner from re-entering the post. The order referred to information received at post headquarters indicating that petitioner had aided in the distribution on the post of an unauthorized publication (Pet. App. 14a–15a). Regulation No. 210–6 of the post provides that written materials can be distributed outside regular channels at the installation only with the prior approval of the post commander, acting upon a request submitted at least ten days in advance (Pet. App. 17a–19a).

On December 11, 1969, petitioner entered Fort Sam Houston and began distributing leaflets announcing a "Town Meeting on the Vietnam War" to be held the following evening at Trinity University in San Antonio (Pet. App. 20a–21a). He was taken into custody by military police inside one of the thirty-one unguarded entrances to the post, while standing on a sidewalk on New Braunfels Avenue in front of the post library (Tr. 18–19).

Petitioner asserted at trial that the debarment order was invalid since he had not, in fact, aided in the earlier distribution and since, at any rate, he had a First Amendment right to distribute literature at Fort Sam Houston, without prior approval by the post commander since the post was generally open to the public. Petitioner further claimed that his distribution of leaflets on December 11 was particularly protected since New Braunfels Avenue—where he was arrested—was used by the general public.

[1] "Tr." refers to trial transcript.

In a comprehensive opinion on which we rely (Pet. App. 1a–13a), the majority of the court of appeals ruled that no military installation is ever so "open" to the public that a post commander may not exclude civilians, and that the provisions of Regulation 210–6, requiring prior notice and approval for the distribution of literature on the post, did not violate petitioner's First Amendment rights. We note, in addition, that while petitioner at trial attempted to dispute the accuracy of the information upon which the debarment was based (see Pet. 5–6), petitioner had not challenged or sought review of the order prior to his re-entry onto the post. He could have sought review either by directly asking the commander to rescind the order or requesting permission to re-enter the fort to distribute literature. Had the post commander denied either request, petitioner could have brought an action in the district court challenging the commander's action as arbitrary or capricious. See *Kiiskila* v. *Nichols*, 433 F. 2d 745 (C.A. 7); *Dash* v. *Commanding General, Fort Jackson, South Carolina*, 307 F. Supp. 849 (D.S.C.), affirmed, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981; *Bridges* v. *Davis*, 443 F. 2d 970 (C.A. 9). Having failed to challenge the debarment order directly, petitioner may not now attack the order indirectly by asserting that the underlying information on which the post commander relied was false.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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